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YOUTH RIGHTS IN THE CRIMINAL PROCESS

An analysis of certain of the youth justice provisions of the Children, Young Persons and their Families Act 1989 from an international childrens rights perspective

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INTRODUCTION

The Children, Young Persons and Their Families Act 1989 ("CYPF Act") has introduced a radical change in the youth justice system in New Zealand. The object of the Act is to promote the well-being of children, young persons and their families. Where young offenders are concerned, this is to be achieved by ensuring they are dealt with in a way that both acknowledges their needs and makes them accept responsibility for their offending. The philosophy underlying the youth justice system under the CYPF Act has shifted away from the welfare oriented approach of earlier legislation, to a justice model emphasising notions of due process and accountability. In line with the new philosophy of accountability the legislation sets out certain rights of young persons in the justice system and provides for young persons to take part in the process when decisions that are being made about their offending.

Central to the Act is the novel approach of empowering families to themselves deal with their children who offend. Under the Act families, whanau, hapu, iwi and family groups are encouraged to play a major role in deciding how offending by their children should be dealt with.

Perhaps not surprisingly, many of the reactions to this new system of youth justice have been adverse. Criticism has emanated from diverse quarters, including police, politicians and judges. There have been press reports about the Act bearing headlines such as "Youth law in trouble from the start",[1] and "Act makes it tough for police to nab young thugs".[2] In an early decision under the Act, Sinclair J described the youth justice provisions as "an absolute minefield."[3] Government backbencher, Jeff Whittaker, presented a paper to caucus on 12 November 1991

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[1] ***The Dominion***, Wellington, New Zealand, 5 December 1992, 10.

[2] ***The Dominion***, Wellington, New Zealand, 18 February 1992, 7.

[3] ***R v Toko*** (1991) FRNZ 447, 447.

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detailing the "frustration" being experienced in Hastings because the Act lacks penalties to effectively deal with vandalism.[4] A number of members of the police have publicly condemned aspects of the Act. Police Association Secretary, Steve Hinds, has described the requirements under the Act to inform young persons of their rights as "too tough";[5] Police Association Secretary, Graham Harding has described provisions of the Act as "unworkable" and "absurd";[6] and Police Commissioner, John Jamieson has stated that the Act has "seriously inhibited" policing and the public good.[7]

It is now nearly three years since the Act came into force on 1 November 1989 and the controversy continues. In the ***New Zealand Herald*** of 20 June 1992 the retiring Police Chief Superintendent of Manukau District Police, Jim Morgan, was quoted as saying that the benefits from the CYPF Act had been "immense"[8]; then, less than 6 weeks later, the Commissioner of Police, John Jamieson, described the provisions as a "serious restriction" on police which was causing them a level of frustration "unmatched in [his] 36 years of policing."[9]

In the midst of the debate about the CYPF Act, an aspect which has received little attention is the international standards which exist in the area of youth justice. In this paper I analyse the objects and principles of the youth justice provisions of the CYPF Act, and look at some specific provisions of the Act, from an international childrens' rights perspective.

There are a number of international instruments setting out the rights of young persons, and providing guidelines for legislation in the area of youth justice. In Part I of this paper, I look at the international instruments relevant to the rights of

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[4] Above n1, 5.

[5] ***The Evening Post***, Wellington, New Zealand, 4 December 1991, 3.

[6] ***The Dominion***, Wellington, New Zealand, 4 December 1991, 1.

[7] (1992) NZLJ 86.

[8] ***New Zealand Herald***, Auckland, New Zealand, 20 June 1992, Section 1, 9.

[9] Text of a speech to Auckland post graduate students, 13 August 1992, p 1.

young persons in the criminal process. In Part II, I briefly outline sources of rights for young persons in the criminal process existing in New Zealand apart from the CYPF Act. From this it will appear that without the CYPF Act, the level of protection available to young persons in the criminal process would be below that required under international instruments. In Part III of this paper, I analyse the objects and principles of the youth justice provisions in the CYPF Act in light of international guidelines. Finally, in Part IV, I look at some specific provisions in the youth justice section of the CYPF Act and analyse criticisms that have been made of those provisions in light of international standards. The scope does not exist in this paper to analyse all the youth justice provisions of the CYPF Act in the light of the international instruments. Accordingly I concentrate only on the provisions relating to diversion, arrest, young persons' rights when being interviewed by police and the admissibility of statements.

I will conclude that the youth justice provisions of the CYPF Act represent a major improvement on the previous legislation in New Zealand, and go a considerable way towards meeting international obligations in the youth justice field. Nevertheless, I will note that there are still a number of areas in which New Zealand laws and practices fall short of meeting the standards required internationally. I will argue that New Zealand domestic law and practices must not be viewed in isolation, but should be constantly compared with the standards expected in the international community. Accordingly the provisions of the CYPF Act must be interpreted by the courts and by those operating under them, bearing the international instruments in mind. In addition, strenuous efforts should be made to improve compliance with international instruments in all areas where New Zealand currently fails to meet international standards.

I INTERNATIONAL STANDARDS

From as early as 1924 when the League of Nations adopted the Geneva Declaration of the Rights of the Child,[10] there has been international recognition that the

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[10] League of Nations *Official Journal, Special Supplement No 21* October 1924, 43.

vulnerability of children and young persons entitles them to special protection. This entitlement is recognised in Article 25(2) of the Universal Declaration of Human Rights,[11] which proclaims that "[m]otherhood and childhood are entitled to special care and assistance." It is also recognised in the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR") (together the "1966 Human Rights Covenants").[12] Article 10(3) of the ICESCR provides:

> Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.

Article 24 of the ICCPR provides:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Because children are entitled to extra protection, in addition to instruments which confer rights on **all** persons, there are a number of international instruments specifically applicable to children and young persons. These instruments elaborate on the special protection States are required to provide to children and young persons.

I outline the international instruments relevant to youth justice below, and give an overview of the standards New Zealand law and practices must meet to conform with international requirements. With the exception of the Universal Declaration of Human Rights, I have divided the instruments into two broad categories: those which impose binding obligations on States Parties and those which set minimum standards expected of Member States.

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[11] General Assembly resolution 217A(III), 10 December 1948.

[12] General Assembly resolution 2200A(XXI), 16 December 1966.

1. Universal Declaration of Human Rights[13]

While the question of whether the Universal Declaration of Human Rights is strictly legally binding is the subject of academic debate, its importance as the "accepted general articulation of recognised rights"[14] cannot be underestimated.

The rights proclaimed in the Universal Declaration are clearly applicable to children and young persons. The preamble refers to the "inalienable rights of ***all members of the human family***" (my emphasis), and Article 2 proclaims that "***Everyone*** is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind ..." (my emphasis).

The Universal Declaration proclaims such basic human rights as the right to "life, liberty and security of person",[15] the right not to be "subjected to arbitrary arrest, detention or exile",[16] and the right of any person charged with a penal offence to be "presumed innocent until proved guilty according to law and in a public trial at which he has all the guarantees necessary for his defence."[17]

The Universal Declaration also emphasises the importance of the family by proclaiming in Article 16(3) that the family "... is the natural and fundamental group unit of society and is entitled to protection by society and the State." Further, Article 12 proclaims that no one shall be subjected to ... arbitrary interference with his privacy, family, home or correspondence."

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[13] Above n11.

[14] American Law Institute *Restatement of the Law the Third - The Foreign Relations Law of the United States* (American Law Institute, St Paul, 1987) 156.

[15] Above n11, Article 3.

[16] Above n11, Article 9.

[17] Above n11, Article 11.

2. Binding Instruments

(a) *The 1966 Human Rights Covenants* - The 1966 Human Rights Covenants elaborate the rights proclaimed in the Universal Declaration of Human Rights. New Zealand has ratified each Covenant and also the Optional Protocol to the International Covenant on Civil and Political Rights. This means New Zealand is legally bound at international law to give domestic effect to the rights set out in the Covenants. As with the Universal Declaration of Human Rights, it is clear the Covenants confer rights on children and young persons as well as adults. The preamble of each Covenant again refers to the "inalienable rights of all members of the human family."

The Covenants reiterate the obligation of Member States to protect the family recognised in the Universal Declaration of Human Rights. Article 10(1) of the ICESCR provides that "[t]he widest possible protection and assistance should be accorded to the family, ... particularly ... while it is responsible for the care and education of dependent children," and Article 23 of the ICCPR provides that "[t]he family is the fundamental group unit of society and is entitled to protection by society and the State."

Amongst other things, Article 9 provides that "Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention," and that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." Article 14 reiterates the right proclaimed in the Universal Declaration of a person charged with a criminal offence to be presumed innocent until proved guilty, and sets out minimum guarantees due to a person in the determination of any criminal charge against him or her. These include the rights "to be informed promptly and in detail of the nature and cause of the charge against him"; "to have adequate time and facilities to prepare his defence"; "to communicate with counsel of his own choosing"; "to be tried in his presence and to defend himself in person or through legal assistance of his own choosing" and the right to be informed of the right to legal assistance.

In addition to these basic guarantees to which all persons are entitled in the determination of any criminal charge against them, Article 14(4) provides that "[i]n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."

(b) ***Convention on the Rights of the Child*** - the Convention on the Rights of the Child was unanimously adopted by the General Assembly in 1989.[18] It details the special care to which children and young persons are entitled bearing in mind the Universal Declaration of Human Rights and the 1966 Human Rights Covenants. The Convention is the first instrument which gives childrens' rights the force of international law for States that ratify it.

The New Zealand Government were one of the sponsors of the Convention and signed it on 1 October 1990. The Convention has received considerable support world wide. This is illustrated both by the record response on the first day the Convention was opened for signature, when 61 countries signed; and by the fact that the Convention entered into force just over 7 months later - which is a remarkably short length of time for an international treaty to come into effect.[19] As at 1 May 1992 the Convention had been ratified by 117 States, making it one of the most highly ratified Conventions.

While New Zealand has not yet ratified the Convention, it has signed it, signifying an intention to ratify.[20] Accordingly, and given the status of this Convention by virtue of its record level of acceptance world wide, it is essential

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[18] General Assembly resolution 44/25 of 20 November 1989, annex.

[19] The Convention came into force on 2 September 1990 - 30 days after the 20th ratification.

[20] Prior to signing the Convention a review of New Zealand legislation was undertaken by the Ministry of External Relations and Trade to identify impediments to eventual ratification of the Convention. Since signing the Convention, the Ministry has coordinated a further review of New Zealand legislation and is currently preparing a report for Cabinet outlining areas where New Zealand legislation conflicts with provisions of the Convention. It is the general practice in New Zealand for any necessary legislative amendments to be made prior to ratifying international Conventions. The Ministry expect a cabinet decision on ratification of the Convention before the end of this year.

that New Zealand legislation in the area of youth justice meets the standards set out in the Convention.

Two of the more important provisions of the Convention for the purposes of this paper are set out below:

Article 37 provides:

> States Parties shall ensure that:
>
> ...
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect of the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40 provides:

> (1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the chid's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> (2) To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: ...
>
> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
>
> (i) To be presumed innocent until proven guilty according to law;
>
> (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; ...

(3) States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

(4) A variety of dispositions, such as care, guidance and supervision orders; counselling; probation, foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

3. Standard Setting Instruments

In addition to the binding instruments outlined above, there are a number of United Nations instruments which are not directly binding on Member States, but provide guidelines as to the minimum standards domestic criminal justice laws and practices are expected to meet. The main standard setting documents which will be referred to in this paper are outlined below.

(a) *The Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment*[21] - This instrument sets out principles to apply for the protection of all persons deprived of their liberty, whether as a result of conviction for an offence or for any other reason. In particular, Principle 16 provides that:

> Promptly after arrest ... a detained or imprisoned person shall be entitled to notify, or to require the competent authority to notify, members of his family or other appropriate

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[21] General Assembly resolution 43/173 of 9 December 1988, annex.

> persons of his choice of his arrest, detention or imprisonment ... and of the place where he is kept in custody. ...
>
> If a detained or imprisoned person is a juvenile ... the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

(b) the ***United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules")***[22] - The Beijing Rules were adopted by the United Nations General Assembly in 1985, and Member States were invited to adapt their national legislation to conform with the Rules. The resolution adopting the Beijing Rules recalls the Universal Declaration of Human Rights and the 1966 Human Rights Covenants, and recognises that "the young, owing to their early stage of human development, require particular care and assistance with regard to physical, mental and social development, and require legal protection in conditions of peace, freedom, dignity and security.[23] The Beijing Rules are designed to serve as a model for member states of standards to be applied in the area of juvenile justice and are "intended to be attainable as a policy minimum."[24]

Part 1 of the Beijing Rules sets out general principles. In particular, Rule 2.3 provides:

> "Efforts shall be made to establish in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed:
>
> (a) To meet the varying needs of juvenile offenders, while protecting their basic rights; ..."

Rule 7.1 affirms the "most basic procedural safeguards"[25] to be applied to juveniles in the criminal process. It states:

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[22] General Assembly Resolution 40/33 of 29 November 1985, Annex.

[23] Above n22, 1.

[24] Above n22, 1.

[25] Official Commentary to Rule 7.1 of the Beijing Rules, above n22, 2.

> Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

Part 2 of the Beijing Rules deals with investigation and prosecution of young persons. In particular, Rule 10 provides:

> 10.1 Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.
>
> 10.2 A judge or other competent official or body shall, without delay, consider the issue of release.
>
> 10.3 Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case.

Rule 11 promotes the use of diversion from the justice system for young persons. Rule 11.1 provides:

> Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority ...

Part 3 of the Beijing Rules sets out rules for adjudication and disposition of cases involving young persons. In particular, Rule 14.2 provides:

> The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

Rule 15 also provides for and accused young person to be represented by a legal adviser, and for the parents or guardians of the young person to participate in the proceedings unless their exclusion is in the young person's interests.

(c) the ***United Nations Rules for the Protection of Juveniles Deprived of their Liberty***[26] ***("the JDL Rules")*** - The JDL Rules were adopted by the United Nations General Assembly in December 1990 recognising "... that because of their high vulnerability, juveniles deprived of their liberty require special attention and protection and that their rights and well-being should be guaranteed during and after the period when they are deprived of their liberty."[27] The JDL Rules were adopted bearing in mind the Universal Declaration of Human Rights and the 1966 Human Rights Covenants, as well as the Convention on the Rights of the Child and the Standard Minimum Rules for the Treatment of Prisoners.[28] Member States were invited to adapt national legislation, policies and practices to the spirit of the JDL Rules and to report regularly to the Committee on Crime Prevention and Control on the results achieved in implementing the JDL Rules.[29]

Amongst other things, the JDL Rules emphasize that deprivation of the liberty of juveniles should be a disposition of last resort used only in exceptional cases, and for the minimum period necessary.[30]

(d) the ***United Nations Guidelines for the Prevention of Juvenile Delinquency***[31] ***("the Riyadh Guidelines")*** - The Riyadh Guidelines were adopted by the United Nations General Assembly in December 1990 in recognition of the need to develop "national, regional and international approaches and strategies for the prevention of juvenile delinquency."[32] Again, the resolution adopting the Riyadh Guidelines cites the Universal Declaration of Human Rights, the 1966

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[26] General Assembly resolution 45/113, 14 December 1990, annex.

[27] Above n26, 2.

[28] Economic and Social Council resolution 663(XXIV), 1.

[29] Above n26, 2.

[30] Above n26, Rules 1 and 2.

[31] General Assembly resolution 45/112, 14 December 1990, annex.

[32] Above n31, 1.

Human Rights Covenants, and the Convention on the Rights of the Child.[33] Guidelines 11 to 19 emphasise the importance of State initiatives to strengthen and support the family, which is the "central unit responsible for the primary socialisation of children."[34] Guideline 52 provides that "Governments should enact and enforce specific laws and procedures to promote and protect the rights and well-being of all young persons."[35] Guideline 58 provides that programmes providing for the diversion of young offenders from the criminal justice system are to be used to the "maximum extent possible."

All of the above standard setting instruments have been drafted bearing the Universal Declaration and the 1966 Human Rights Covenants in mind. They detail what is expected of Member States in order to fulfil their obligations under those instruments. It should be noted that the United Nations Human Rights Committee has called upon Member States to indicate whether they are applying the Beijing Rules in their periodic reports to the Committee under the ICCPR.[36] Compliance with international standard setting documents can be seen as part of New Zealand's binding obligations under the 1966 Human Rights Covenants, and accordingly it is imperative that our domestic legislation and practices in the area of juvenile justice are not viewed in isolation, but are constantly compared with standards laid down by the international instruments.

II THE POSITION APART FROM THE CYPF ACT

Prior to the CYPF Act 1989 there was little statutory protection for young people embroiled in the criminal process in New Zealand. What did exist were the Judges' Rules of 1912 and 1930 (applicable to all people subject to police interviews) and certain common law rules which evolved to specifically protect young people. There

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[33] Above n31, 1.

[34] Above n31, Guideline 12.

[35] Above n31, Guideline 52.

[36] General Comment No 21 (44) adopted on 6 April 1992. Ref CCPR/C/21/Rev.1/Add.3, p 6.

were also internal police guidelines for dealing with young people contained in the police General Instructions. Since the CYPF Act was enacted in 1989, the New Zealand Bill of Rights Act 1990 ("Bill of Rights") has been enacted, creating a further important source of rights for people involved in the criminal process. I briefly outline below the relevant rights that derive from each of these sources.

1. The Judges' Rules

The Judges' Rules, formulated by the Queens Bench Division, provide guidelines for the police when they are conducting inquiries as to what behaviour is considered "fair" by the Courts.[37]

The Judges' Rules provide that once a police officer who is questioning a person has decided to charge that person with a crime, the person must be cautioned that he or she is not obliged to say anything, but anything he or she does say will be taken down in writing and may be used in evidence. This caution must also be given when the person is taken into custody, and before a voluntary statement is taken from him or her.[38] A statement made before there was time to caution a person will be admissible, however.[39]

These rules apply to evidence obtained from children and young persons, as well as from adults.

The Judges' Rules do not have the force of law, however a Judge has discretion to refuse to admit evidence obtained in contravention of them.

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[37] R A Caldwell *Garrow and Caldwell's Criminal Law in New Zealand* (6 ed, Butterworths, Wellington, 1981) 494.

[38] Judges' Rules 1912, Rules 2, 3, 4 and 5.

[39] Above n38, Rule 6.

2. Police General Instructions

Certain of the police General Instructions are designed to provide guidance for police officers when dealing with young people. They are not enforceable in a court of law and therefore afford little protection to a young person if they are not complied with.[40] The police officer involved may be subject to disciplinary measures, however any statement obtained from the young person will not necessarily be excluded as evidence in proceedings against that young person.

I summarise below the guidelines prescribed in the General Instructions:

(a) In an interview with anyone under 17, extreme care must be exercised to ensure no untrue admission of guilt or incorrect information is obtained on account of youth or lack of maturity. Any admission should be corroborated before acceptance.[41]

(b) In an interview with a child under 14, a parent, guardian or teacher must be present unless there is a good reason to the contrary; and children under 14 should only be taken to a police station in "unavoidable circumstances".[42] 14-17 year olds should be interviewed in the presence of a parent, guardian or teacher where practicable, having regard to the particular circumstances.[43]

(c) When anyone under 17 is interviewed without a parent or guardian present, the parent or guardian must be informed promptly.[44]

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[40] However, Courts will look at breaches of the General Instructions as part of the background when deciding whether or not an interview was conducted "fairly". See page 16 below.

[41] Police General Instruction C42(1).

[42] Above n41, C42(2).

[43] Above n41, C42(4).

[44] Above n41, C42(5).

(d) The utmost restraint and discretion should be exercised in using the power to arrest young persons without a warrant. Such arrests must only be made where there is good and sufficient reason.[45]

3. Pre-1989 New Zealand Case Law

The lack of clear statutory provisions for safeguarding the rights of young persons in criminal investigations prior to 1989 led to a body of case law developing to supplement the Judges' Rules where young persons are concerned. In ***R v C***,[46] Chilwell J accepted as "a statement of general principle" that there was:

> ... special need for care to ensure that young persons, because of their immaturity and other well-known characteristics, do not make untrue admissions of guilt, do not give incorrect information, and are protected against self-incrimination.

The Court of Appeal in ***R v Tuhua***[47] stated:

> It is obvious enough that particular care and sensitivity are necessary on the part of police interviewers if they are fairly to question immature young people.

Some particular principles that emerged from New Zealand case law prior to the CYPF Act, are:

(a) While a breach of the Police General Instructions will not mean a statement is inadmissible, those instructions must not be "honoured in the breach".[48] They set out guidelines as to fairness and should be treated by the Courts in a similar way to the Judges' Rules.[49]

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[45] Above n41, A106(2).

[46] Unreported, 28 February 1984, High Court Auckland Registry T100/73, Chilwell J.

[47] Unreported, 22 November 1988, Court of Appeal CA 2072/88.

[48] See: ***R v I*** (1987) 3 CRNZ 444, 445; ***H v Police*** (1989) 4 CRNZ 621, 623.

[49] ***R v W*** Unreported, 20 March 1987, Court of Appeal CA 33/87, 12.

(b) Police should be active in telling young people of their rights, not neutral.[50]

(c) A caution must be broken down into simple language so that a young person can fully appreciate his or her rights.[51]

(d) Where a young person is to be interviewed, police should make "strenuous efforts" to contact a parent or guardian.[52] The fact that a young person does not ask for a parent to be notified, or for a phone call, may not be relied on as a sufficient reason for interviewing the young person without the presence of a parent or guardian.[53] The fact that the offence a young person is being questioned about is not serious is not a sufficient reason to interview a young person without contacting his or her parents or guardian.[54]

(e) The level of maturity of a young person is a relevant factor in deciding whether or not a statement was fairly obtained - the court must "calculate how street wise [the young person] is."[55]

The case law does not guarantee to young persons any special protection. Non-compliance with the Judges' Rules or the police General Instructions does not mean that any evidence obtained must be excluded. Non-compliance is just a factor to be balanced when deciding whether evidence was fairly obtained. Against this other factors are to be balanced, such as the policy value of "conceding to police a proper degree of freedom in pursuing their investigations" (***R v Tuhua***)[56] and the degree to which the young person is "street wise" (***R v H***).[57] Accordingly, the pre-1989

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[50] Above n49, 12.

[51] Above n49, 13.

[52] Above n48, 445.

[53] ***M v Police*** (1988) 3 CRNZ 506,511; ***R v W***, above n49, 12.

[54] Above n52, 511.

[55] ***R v H*** (1986) 2 CRNZ 571, 573-574.

[56] Above n47.

[57] Above n55, 574.

case law not only fails to guarantee to young persons such basic procedural safeguards as the right to consult a lawyer and a parent or guardian, but in fact clearly contravenes international standards by allowing the degree to which a young person is "street wise" to be a factor taken into account when deciding whether evidence obtained in contravention of the Judges' Rules or police General Instructions should be admitted. The international instruments relevant to youth justice all clearly state that in the application of the rights conferred by those instruments to young persons there must be no discrimination for any reason.[58]

4. New Zealand Bill of Rights Act 1990

The Bill of Rights confers certain rights on **all** persons in relation to aspects of the criminal process, including children and young people. In particular section 23(1)(b) provides that everyone who is arrested or detained under any enactment has the right to consult and instruct a lawyer without delay, and to be informed of that right, and section 23(4) provides that everyone who is arrested or detained under any enactment for any offence or suspected offence has the right to refrain from making any statement and to be informed of that right. Section 23(5) provides that "[e]veryone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person."

Section 25(i) provides that a child charged with any offence has the right to have the determination of the charge "... dealt with in a manner that takes account of the child's age."

5. Summary of Protection for Young Persons existing apart from the CYPF Act

It will be seen that apart from the CYPF Act, young persons facing criminal proceedings have little "special protection" as required by the international instruments. The Judges' Rules provide basic protection to which all persons are entitled and do not provide any extra protection for young persons and the case law

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[58] See Article 10(3) of the ICESCR, Article 24 of the ICCPR, Article 2 of the Convention on the Rights of the Child; Rule 2.1 of the Beijing Rules and Rule 4 of the JDL Rules

falls short of guaranteeing extra protection to young persons. The Bill of Rights provides certain basic procedural rights to all persons in the criminal process, such as the right to consult a lawyer, and clearly significantly improves the protection available to young persons from that provided under the pre-1989 case law. However, only section 25(i) could be seen as providing any degree of "special protection" to young persons, by providing that children have the right to have charges against them determined in a manner which takes account of their age. It is submitted that this provision is not, in itself, sufficient to meet our international obligations to give "special protection" to young persons.

Article 3(2) of the Convention on the Rights of the Child provides:

> States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being ... and, to this end, shall take all appropriate legislative and administrative measures.

Article 40(3) provides:

> States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law ...

Article 2.3 of the Beijing Rules provides:

> Efforts shall be made to establish, in each national jurisdiction, a set of laws rules and provisions specifically applicable to juvenile offenders ... designed:
>
> (a) to meet the varying needs of juvenile offenders, while protecting their basic rights ...

These provisions clearly envisage legislation guaranteeing extra protection to young persons to take account of their vulnerability. Accordingly, the need for the protection afforded to young persons under the CYPF Act is clear: without it New Zealand does not meet the standards required by international instruments in the area of juvenile justice.

Having given an overview of the requirements of international instruments in the area of juvenile justice, and of the protection accorded to young persons from sources aside from the CYPF Act, I now go on to critically examine the extent to which the CYPF Act meets international standards.

III PHILOSOPHY, OBJECTS AND PRINCIPLES OF THE CYPF ACT

1. Philosophy of the Act - A Change from a Welfare Model to a Justice Model of Youth Justice

There are two basic models of youth justice legislation, predicated on different philosophies of youth offending. The models are the "welfare" model and the "justice" model. Since 1925, and prior to the CYPF Act, New Zealand legislation for dealing with young offenders was based on the welfare model. This means it was based on the premise that youthful offending is a symptom of social problems and can be "cured" by taking a welfare approach. The philosophy of the Child Welfare Act 1925 was described as follows:

> The system of dealing with children under the Criminal Code has given place to a system of equity whereby the child is not regarded as a criminal who should be punished, but as one who requires the protection and assistance of the Court.[59]

The long title to the Children and Young Persons Act 1974 showed a similar philosophy underpinned that Act. It was said to be:

> An Act to make provision for preventive and social work services for children and young persons whose needs for care, protection and control are not being met by parental or family care and who are at risk of becoming deprived, neglected, disturbed or ill-treated or offenders against the law.

Under the 1974 Act, a child's offending was seen as being a symptom of a lack of parental care or control meaning the child needed help. Children (defined as those under 14 years old) could only be brought before a Court by way of an action

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[59] Appendix to the Journals of the House of Representatives of New Zealand, 1920, E4, 13. (Quoted in J A Seymour, ***Dealing with Young Offenders in New Zealand - The System in Evolution***, (Legal Research Foundation, School of Law, Auckland, New Zealand, 1976) 38.)

against their parents that they were in need of care, protection or control. Young persons (those over 14 but under 17) could come before a Court in relation to an offence either by being prosecuted, or by way of a complaint that they were in need of care, protection or control. A police officer dealing with a youthful offender had the options (aside from taking no action or issuing a warning) of arresting the young person, in which case a prosecution would almost invariably[60] follow; or referring him or her to the Youth Aid section of the police. The latter procedure was based on a "welfare" philosophy in that under section 26, in most cases,[61] before a Youth Aid officer could prosecute the young person a conference with a social worker had to be held.[62]

The CYPF Act introduces a change from the welfare model of legislation to the justice model. This model is predicated on the idea that juvenile offending is simply a stage many young people go through,[63] and that the appropriate way to deal with it is to hold the young person responsible for their offending. While a welfare model of youth justice legislation focuses mainly on the welfare of the offender, a justice model focuses on the offence. It emphasises accountability, and provides that welfare issues should be dealt with separately.[64]

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[60] Occasionally the police Prosecutions Section or a supervising officer would overrule a decision to prosecute.

[61] There were exceptions to the requirement for a Youth Aid consultation where a young person was charged with murder, manslaughter, a non-imprisonable traffic offence or was already serving a sentence of supervision or periodic detention.

[62] While the philosophy of the 1974 Act was by and large a "welfare" philosophy, in practice the results under the Act were not always consistent with the ideology of a welfare model. See page 22 below.

[63] Considerable weight for this proposition is provided by a study carried out by the Research Section of the Department of Social Welfare and published in 1990, which recorded all court convictions of a cohort of New Zealand males born in 1957 who were still in New Zealand at age 10. The study found that at least one in every four males under the age of 25 in the study had appeared in a criminal court and been convicted before reaching the age of 25. It also found that over two thirds of them made only one or two appearances; and only a small percentage appeared on numerous occasions. See ***One in Four: Offending from age ten to twenty-four in a cohort of New Zealand males***, R Lovell and M Norris (Research Section, Department of Social Welfare, Head Office, Wellington, New Zealand, 1990). See also clause 5(e) of the United Nations Guidelines for the Prevention of Juvenile Delinquency.

[64] See section 208(b) of the CYPF Act.

Both models are open to criticism. A "pure" justice model would not require the welfare of a young offender to be taken into account at all when dealing with his or her offending. However, international standards clearly provide that the welfare of the young person must be treated as an important consideration when determining how to deal with a young offender.[65] The CYPF Act cannot be criticised on this ground, because the welfare of young persons is not excluded from factors to be taken into account when dealing with their offending.[66]

The welfare model, on the other hand, has been criticised as often leading to far greater intrusion into a young person's life than the offence which brought the young person to attention warrants.[67] Therefore a young person's right to due process in the criminal system can be seen as being infringed.[68] This was a problem that was identified under previous New Zealand youth justice legislation by the National Director of the Children, Young Persons and their Families Unit of the Department of Social Welfare:

> Previously, putting a young person in an institution because the particular offence defined someone as needing care, meant the sentence was often out of all keeping with the offence.[69]

Such a result can be seen as conflicting with Article 9(1) of the ICCPR, which prohibits "arbitrary detention" of persons; and Article 17 which states that "No one shall be subject to arbitrary ... interference with his privacy, family [or] home." Rule 18.2 of the Beijing Rules is also relevant. In this respect, the move to a "justice" model of juvenile justice should lead to practices in the youth justice area conforming more closely to international standards than past practices under the "welfare" model.

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[65] See the discussion on page 24 below.

[66] See page 23 below.

[67] See M Levine and H Wyn ***Orders of the Youth Court and the Work of the Youth Justice Coordinators*** (Evaluation Unit, Department of Social Welfare, Wellington, New Zealand, 1991) 53. See also the commentary to Rule 5, Beijing Rules, set out on page 10 below.

[68] Note, in particular, Rule 17.1(a) of the Beijing Rules.

[69] ***The Dominion***, Wellington, New Zealand, 16 January 1992, 7.

2. Object of promoting the well-being of young persons

While the CYPF Act represents a move to the justice model, it does not exclude the welfare of young persons from consideration when dealing with young offenders. This can be seen from the object of the Act, and the general principles set out in section 5.

The sole object of the CYPF Act is set out in section 4. It is to "promote the well-being of children, young persons and their families and family groups." This statement of the object of the Act is followed by examples of the way in which the Act intends to achieve this aim. As far as the youth justice provisions of the Act are concerned, the well-being of young persons is to be achieved by:

> Ensuring that where children or young persons commit offences, -
>
> (i) They are held accountable, and encouraged to accept responsibility, for their behaviour; and
>
> (ii) They are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways.[70]

It is implicit from section 4 that the move to a justice model of dealing with young offenders is, at least in part, *aimed* at promoting the well-being of young persons.

Specific provision for the welfare of young persons to be taken into account in the exercise of powers under the youth justice provisions of the Act is set out in section 5(c).[71] This provides that:

> Consideration must always be given to how a decision affecting a young person will affect:
>
> (i) the welfare of that child or young person; ...

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[70] Section 4(f).

[71] Section 5 sets out principles that apply to the entire Act.

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Although section 5(c) provides that the welfare of a young person must be taken into account when making decisions affecting that young person, it is implicit in the Act that (unlike the 1974 Act) this is not to be the paramount consideration as far as the youth justice provisions of the Act are concerned.[72] While international standards do require that the welfare of a young person must be considered, it need not be the paramount consideration. For instance, Article 3 of the Convention on the Rights of the Child provides that:

> (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be *a primary* consideration. [My emphasis]

Similarly, Rule 5.1 of the Beijing Rules provides:

> The juvenile justice system shall *emphasize* the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence. [My emphasis]

It can be seen from the official commentary to Rule 5 of the Beijing Rules, that they are designed to apply to both the welfare and justice models of youth justice legislation, and are in fact designed to curb the most severe effects of each model. It reads:

> Rule 5 refers to two of the most important objectives of juvenile justice. The first objective is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions.

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[72] Section 5 of the CYPF Act is expressed to be subject to section 6. Section 6 provides that where any conflict of principles or interests arises "the welfare and interests of the child or young person shall be the deciding factor." However, section 6 applies only to Parts I, II, III, VI (other than sections 351-360), VII and VIII of the Act - ie, all sections *other than* the youth justice sections. The fact that section 6 is expressly excluded from these sections indicates that the 'paramountcy' rule is not to apply in the youth justice area. This is also shown in the Government's comments on a recommendation of the Ministerial Review Team that the paramountcy principle in the Act be strengthened. The Government's Response included a statement that "[e]nactment of the paramountcy principle on the lines suggested could blur the new approaches to youth justice, which concentrate on the accountability of young offenders for their behaviour." ***The Government's Response to the Report of the Ministerial Review Team***, 30 May 1992, p 1.

> The second objective is 'the principle of proportionality'. This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just desert in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender ... should influence the proportionality of the reaction. ...
>
> [R]eactions aiming to ensure the welfare of the young offender may go beyond necessity and therefore infringe upon the fundamental rights of the young individual, as has been observed in some juvenile justice systems. Here, too, the proportionality of the reaction to the circumstances of both the offender and the offence, including the victim, should be safeguarded.

3. Object of promoting the well-being of young persons' family groups

Under the Children and Young Persons Act 1974, a young offender's family had little involvement in the process of deciding how he or she should be dealt with.[73] An innovation of the CYPF Act is the emphasis which is placed on the family group throughout. The general principles applicable to the whole Act in section 5 provide that a young person's family, whanau, hapu, iwi and family group should participate in making decisions affecting that young person,[74] that the relationship between a young person and his or her family group should be maintained and strengthened,[75] and that consideration must always be given to how a decision affecting a young person will affect the stability of that young person's family group.[76]

Section 208 sets out principles specifically applicable to the youth justice provisions of the CYPF Act. Included in section 208 is the principle that measures for dealing with young offenders should be designed to strengthen the family of the young person; and foster the ability of families to develop their own means of dealing with their young offenders. Thus two main propositions in relation to the family of an offender emerge:

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[73] A Morris and W Young, ***Juvenile Justice in New Zealand: Policy and Practice*** (Institute of Criminology, Victoria University of Wellington, 1987) - pp 96 and 105.

[74] Section 5(a).

[75] Section 5(b).

[76] Section 5(c)(ii).

(a) that the family should be ***involved in decision-making*** as to how to deal with a young offender; and

(b) that an important aim of any measures taken must be to ***strengthen*** the family group.

The aim of strengthening the family group is supported in international instruments. Article 16(3) of the Universal Declaration of Human Rights, and Article 23 of the ICCPR provide:

> The family is the natural and fundamental group unit of society and is entitled to protection by Society and the State.

Article 10(1) of the ICESCR provides:

> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

The preamble to the Convention on the Rights of the Child states:

> ... the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.[77]

In addition, Article 11 of the United Nations Guidelines for the Prevention of Juvenile Delinquency provides that: "Every society should place a high priority on the wellbeing of the family and all its members" and Article 12 provides that:

> Since the family is the central unit responsible for the primary socialization of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. ...[78]

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[77] Above n18, preambular paragraph 5.

[78] See also Rules 18.2 and 25.1 of the Beijing Rules; and Guidelines 13, 16 and 17 of the United Nations Guidelines for the Prevention of Juvenile Delinquency.

The principle that the family of a young person should be involved in decision-making about that young person is also supported by the international instruments. Rule 15.2 of the Beijing Rules, provides that the parents or guardians of a young person have the right to participate in all proceedings in relation to that young person, unless their exclusion is in the young person's interests. In addition, Article 5 of the Convention on the Rights of the Child, provides that:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

4. The young person's voice

While the emphasis on family participation in decision-making is a commendable innovation supported by international instruments, I submit that this emphasis has resulted in a lack of proper emphasis on the right of young persons to express their views when decisions are made concerning them. While section 5(a) of the CYPF Act sets out the principle that a young person's family, should "*participate*" in decision-making, and wherever possible "*regard should be had*" to their views; section 5(d) sets out the principle that, where a young person's views can be reasonably ascertained, they should be given "*consideration*". This contrast in wording can convey the impression that the views of the family are to be given greater weight than the views of the young person.

The original Children and Young Persons Bill was subject to criticism for being of a monocultural nature; and, in particular, the paramountcy accorded to the interests of young persons was seen as conflicting with Maori traditional beliefs in which tribal views have precedence over the views of birth parents, and a young person's position is seen as involving duties rather than rights.[79] A great deal of effort was put into making the final version of the Bill more culturally sensitive, and this may

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[79] *Butterworths Family Law Service Commentary*, paragraph 6.603, p 6810.

explain this apparent subsuming of the young person's wishes to the views of the family under the CYPF Act.

However, when international guidelines in this area are examined, it is submitted there is a strong argument that prominence should be given to the views of young persons. For example, in the context of adjudication of cases of juvenile offending, Rule 14.2 of the Beijing Rules provides:

> The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

Rule 15.2 provides that the parents or guardians of juveniles are entitled to participate in proceedings except where their exclusion is in the interests of the juvenile. It will be seen that under the Beijing Rules greater importance is placed on the participation of the young person than his or her parents, as the young person is *always* entitled to participate, but in some circumstances his or her parents are not so entitled.

The Convention on the Rights of the Child provides that children have a right to be heard in Article 12:

> States Parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

It is submitted that to meet international standards, it is imperative that the principle that a young person's views be given "consideration" is interpreted in a way that ensures the importance attached to a young person's views is no less than the importance attached to his or her family's views.

It is also notable that section 5(d) of the Act states that when considering a young person's wishes, those wishes shall be given "such weight as is appropriate in the circumstances, having regard to the age, maturity, ***and culture*** of the child or young

person" [my emphasis]. The inclusion of the word "culture" must mean that different weight may be accorded to young persons' wishes where they are of different cultures. Thus, a young person from a culture where the views of young persons are traditionally accorded little value, will have less regard taken of his or her wishes, than the wishes of a young person from a different culture where young persons have a greater say.[80] Such a proposition is unacceptable by international standards.

Article 7 of the Universal Declaration of Human Rights states:

> All are equal before the law and are entitled without any discrimination to equal protection of the law.

Article 26 of the ICCPR states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 of the Convention on the Rights of the Child is also relevant in this regard. Article 2 provides that parties to the Convention:

> ... shall respect and ensure the rights set forth ... irrespective of the child's or his or her parents' or legal guardians' race, colour, sex, language, national, ethnic or social origins, property, disability, birth or other status.

The inclusion of a young person's culture as a guide to the weight that should be accorded to his or her views in the CYPF Act clearly conflicts with international law.

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[80] See M Henaghan, "The 'Rights' of Children when Decisions are made about and which Affect the Welfare and Interests of Children", in ***The Family Court Ten Years On*** (Family Law Conference papers, New Zealand Law Society, Auckland, 1991) 48, 54.

During a study of the youth justice system in New Zealand in 1987 (relating to the 1974 Act), a number of young people were interviewed about their experiences in the Children and Young Persons Court. "It's a waste of time talking. They don't listen," was the response of one.[81] This sentiment was echoed by other young people interviewed. While the principle in section 5(d) of the CYPF Act goes some way towards providing young people with the right to express their views, I submit it could go further. The move to a "justice" system of dealing with offending by young people involves treating young people as being responsible for their actions. A concomitant of this accountability must be a readiness of those in authority to listen to, and attach importance to, young peoples' views. The principles section of the CYPF Act undermines the voice of children and young persons; both by the implication that the family's views are more important, and by the provision that a young person's culture will affect the weight attached to his or her views.

In a recent study of the youth justice provisions of the CYPF Act, the conclusion was reached that:

> There is no doubt that the perceived level of involvement of families and young people is far greater now than in the former system where many of them would have been part of the court process. ...
>
> However, the fact remains that the majority of young persons felt that they had not been involved in the FGC or in the decision about the outcome.[82]

This result does not conform with international instruments in the youth justice field.

5. Principles guiding exercise of powers under the Youth Justice provisions

Section 208 sets out principles specifically applicable to the youth justice provisions of the CYPF Act, and I summarise these below.

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[81] Above, n73, 105.

[82] G M Maxwell and A Morris ***Family Participation, Cultural Diversity and Victim Involvement in Youth Justice: A New Zealand Experiment*** Institute of Criminology, Victoria University of Wellington, Wellington, 1992. [NB: As at 1 September 1992 publication of this paper is pending, and quotation from it has only been permitted on the basis that any findings will not appear in any publication without the prior consent of the authors.]

(a) *Diversion*

Section 208(a) provides that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a young person if there is an alternative means of dealing with the matter.

The principle of diverting young offenders from the criminal justice system is in accordance with the international guidelines for dealing with young offenders, and is discussed in more detail on pages 34-37 below.

(b) ***Penalties to be designed to strengthen family and take least restrictive form***

Section 208(d) provides that a young person who commits an offence should be kept in the community where practicable (and consonant with the need to ensure public safety). Section 208(f) provides that any sanctions should take the form most likely to promote the development of the young person within his or her family and should take the least restrictive form appropriate.

The support existing in the international instruments for measures designed to strengthen the family unit has already been shown on page ? above. The principle that penalties should take the least restrictive form appropriate also conforms with international guidelines relating to youth justice. For example, Rule 5(2) of the Standard Minimum Rules for the Treatment of Prisoners provides that "[a]s a rule, ... young persons should not be sentenced to imprisonment" and Rule 2.6 of the Standard Minimum Rules for Non-custodial Measures provides that "[n]on-custodial measures should be used in accordance with the principle of minimum intervention." Rule 17.1(c) of the Beijing Rules provides that "Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum."

(c) *Principle of vulnerability*

Section 208(e) provides that a young person's age is a mitigating factor in determining whether impose sanctions in respect of offending and the nature of any sanctions; and section 208(h) provides that a guiding principle of the youth justice provisions is that the vulnerability of young persons entitles them to special protection during investigations into the commission or possible commission of any offence by them.

The principle that children and young persons require special protection is clearly supported by the international instruments. It is set out in the Universal Declaration of Human Rights, the ICESCR and the ICCPR[83] and is the fundamental concept underlying the various international instruments that are specifically applicable to young persons.

It will be seen from the above that the philosophy, object and principles of the youth justice provisions of the CYPF Act mostly conform to international guidelines for dealing with young people within the criminal process. The major exception to this is in relation to the right of young persons to express their views when decisions are being made about them and I have suggested, above, that section 5(d) of the CYPF Act does not meet international standards in this regard. Further, there is evidence that practices under the youth justice system introduced by the CYPF Act are leaving the majority of young persons feeling that their views have not been heard.

IV SPECIFIC PROVISIONS OF THE CYPF ACT

1. Application of the Act

Before I go on to examine particular provisions of the CYPF Act to determine the extent to which they comply with international instruments, one important area where the Act does not meet international standards must be mentioned. The

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[83] See page 4 above.

CYPF Act applies to children and young persons. A child is defined as any person beneath the age of 14 years; and a young person is defined as any person over the age of 14 years but under 17 years, but excluding any person who is or has been married.[84]

In relation to the right to special protection under the ICCPR, the United Nations Human Rights Committee have issued the following General Comment:[85]

> The right to special measures of protection belongs to every child because of his status as a minor. Nevertheless, the Covenant does not indicate the age at which he attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions. ... However, the Committee notes that the age for the above purposes should not be set unreasonably low and that in any case a State party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law.

Pursuant to this comment, there is a strong argument that the protection extended under the CYPF Act ought to be applied to all persons under the age of eighteen.

In this regard it is also notable that the Convention on the Rights of the Child defines a "child" as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."[86] Further, although the Beijing Rules define a "juvenile" as "any child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult,"[87] Rule 3.3 provides that "[e]fforts shall also be made to extend the principles embodied in the Rules to young adult offenders." The JDL Rules expressly apply to all persons under the age of 18.[88]

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[84] Section 2.

[85] General Comment 17 [35], adopted on 5 April 1989. Ref CCPR/C/21/Rev.1, p 22.

[86] Above n17, Article 1.

[87] Above n22, Rule 2.2(a).

[88] Above n25, Rule 11(a).

2. Diversion

The international standards that relate to youth justice strongly encourage diversion of young offenders from the formal criminal process. The CYPF Act includes provisions which promote diversion, and an analysis of statistics before and after the CYPF Act came into force indicates that the specific provisions of the Act are proving effective in practice.

Under the 1974 Act, diversion was encouraged by the provision of "Youth Aid Consultations".[89] However research carried out in 1987[90] concluded that the diversionary mechanisms set out in that Act did not work. Two main reasons were advanced for this. Firstly, the general failure of police to adopt this method of dealing with young offenders and, secondly, police domination of the Youth Aid conferences that did take place. The report found that when Police believed a young person should be prosecuted they would arrest him or her, to avoid the necessity for a Youth Aid consultation.[91] This finding was recently borne out in comments made by the retiring police Chief Superintendent of Manukau District Police, Jim Morgan, who told of his experience of police arresting young persons under the old legislation so that their cases would not go through the youth aid section, which they perceived as the "soft path".[92]

The CYPF Act provides that police[93] officers **must** consider giving a warning rather than prosecuting a young person (unless a warning is clearly inappropriate)[94]. Section 245 provides that a young person must not be prosecuted for an offence (other than murder, manslaughter or a traffic offence not punishable by

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[89] See page 21 above.

[90] Above, n73.

[91] Above, n73, 34.

[92] Above n8, Section 1, 9.

[93] I use the word "police" throughout this paper for the sake of clarity. In the statute the term used is "enforcement officer", which covers police, traffic officers and public service and local authority officials (section 2(1)).

[94] Section 209.

imprisonment) unless the police officer concerned believes prosecution is required in the public interest; and there has been consultation between the informant (or a person acting on his or her behalf), and a youth justice coordinator; and, usually,[95] the matter has been considered by a family group conference. Where a young person has been arrested (for an offence other than murder, manslaughter or a traffic offence not punishable by imprisonment), unless the young person denies the charge,[96] a family group conference must be held before the Court decides the outcome of the case.[97]

These provisions make consideration of diverting a young offender mandatory when a police officer is contemplating instituting criminal proceedings. They also mean criminal proceedings cannot be commenced without a family group conference having been held (except where the young person has been arrested, and in that case, unless the young person denies the charge, no plea can be entered without a family group conference having discussed the case).

Thus the provisions in the CYPF Act create a strong presumption in favour of diversion, and the evidence available so far indicates that this is resulting in a dramatic change in the way young offenders are being dealt with.

A 1990 study[98] found that the majority of identified offenders who were not arrested (66%), were being diverted by way of police warnings and formal cautions.

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[95] Section 248 provides certain specific exceptions to the requirement that a family group conference be held before a young person may be prosecuted. Further exceptions are likely to be added following the Report of the Ministerial Review Team on the CYPF Act (see p 40 of the Report and pp 12-13 of the Government's Response).

[96] If the young person denies the charge, sections 273 to 276 apply, which provide for appropriate courts to hear and determine cases. Note, however, if the charge is proved and a family group conference has not already been held, a youth justice coordinator must convene a family group conference to consider ways the court may deal with the offence forming the basis of the charge (unless the situation falls within one of the exceptions in section 248) (section 247(3)).

[97] Section 246.

[98] G M Maxwell and A Morris A, "Juvenile Crime and the Children Young Persons and their Families Act 1989", ***An Appraisal of the first Year of the Children Young Persons and their Families Act 1989, A Briefing Paper*** (Office of the Commissioner for Children, Wellington, 1991) 24, 27.

A further 13% were diverted with police warnings and the imposition of sanctions (eg apology, reparation or community work). The remaining 21% were cases where the Police thought prosecution should be considered, and were referred to a Youth Justice Coordinator so that a family group conference to discuss the matter could be held. A large majority of these cases (80%) did not result in a court appearance following the Family Group Conference. The end result is that only approximately 4% of identified offenders (who were not arrested) appeared in the Youth Court and were dealt with by way of a court order.[99]

Of identified offenders who were arrested (who encompassed only 6% of the total of identified offenders - see page 26 below), the majority would also not have been dealt with by way of a court order. A family group conference must be convened before the Court decides the outcome of a case (unless the young person denies the charge laid) and the recommendations of conferences are frequently accepted. This often leads to the prosecution withdrawing the charge.[100] These figures clearly show that since the CYPF Act came into force only a tiny proportion of the total of young persons identified by police as having offended are dealt with by way of a court conviction and sentence; the vast majority being diverted either by police action or as a result of family group conference recommendations.

This can be contrasted with figures from 1984 which indicated 55% of offenders were diverted - the remainder being dealt with in the Children and Young Persons Court.[101]

A study of juvenile offending in 1990 stated:[102]

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[99] Above n98, 27.

[100] Above, n98, 28.

[101] G Maxwell and A Morris *A Statistical Overview of Juvenile Offending Before and Since the Children, Young Persons and their Families Act 1989* (Institute of Criminology, Victoria University of Wellington, 1990).

[102] Above n101, 21.

> The main conclusion to emerge ... is that offending patterns have changed very little, if at all, since the introduction of the 1989 Act, but that responses to juvenile offending have changed markedly.

The study concluded:

> The results reported here are very encouraging. They suggest the Act is achieving its goal of diverting many young offenders from the Youth Court.[103]

This result is totally in accord with the international instruments that deal with youth justice. For example, Article 40(3) of the Convention on the Rights of the Child provides:

> (3) States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: ...
>
> (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

Rule 11 of the Beijing Rules, which provides:

> 11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority ...
>
> 11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.

Article 58 of the United Nations Guidelines for the Prevention of Juvenile Delinquency provides:

> Law enforcement and other relevant personnel, of both sexes, should be trained to respond to the special needs of young persons and should be familiar with and use, to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system.

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[103] Above n101, 28.

3. Arrest

International human rights instruments clearly provide that the arrest of young persons is only permissible as a measure of last resort. The CYPF Act lays down stringent criteria which must be met before a young person may be arrested and statistics show that this is resulting in a considerable reduction in the numbers of young persons being arrested compared with previous legislation.

Section 214 provides that (other than where a young person is suspected of committing a purely indictable offence, or where a police officer believes, on reasonable grounds, that arrest is necessary in the public interest), a young person may **not** be arrested except on specified grounds. In summary, the police officer must be satisfied, on reasonable grounds:

(a) that arrest is necessary to:
  (i) ensure the young person's appearance before court; or
  (ii) prevent the young person committing further offences; or
  (iii) prevent the destruction of evidence of interference with witnesses,
  and

(b) that a summons would not achieve that purpose.

A written report stating why the young person was arrested must be furnished to specified senior officers (depending on the authority under which the enforcement officer acted) within 3 days.

There is evidence to show that this statutory limitation of circumstances in which a young person may be arrested has resulted in a substantial decrease in arrests of young persons. Recalling police practices of Auckland in the 1970's, retired police Chief Superintendent, Jim Morgan, was recently quoted as saying: "Young people were arrested without any regard for their age. I remember visiting the cells and finding young people in cells who could barely look over the middle bar ...".[104]

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[104] Above n8.

Statistics have shown that in 1984 29% of juvenile offenders identified by police were arrested. However a study of police statistics undertaken in 1990 revealed that only 6% of identified offenders were being arrested since the Act came into force.[105]

This decrease in arrests of young persons is in keeping with international guidelines. Article 9(1) of the ICCPR provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.

Article 37(b) of the Convention on the Rights of the Child provides:

> States Parties shall ensure that: ...
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and ***shall be used only as a measure of last resort*** and for the shortest appropriate period of time; [my emphasis]

4. Rights of young persons when being questioned by police

Section 215 of the CYPF Act is perhaps the section that has caused the most controversy since the Act came into force. This section sets out the explanations which must be given by an enforcement officer when "*questioning*" a young person in relation to the possible commission of an offence "*by that young person*".

In summary, it provides that where a young person has not been arrested, but sufficient grounds for arrest exist, the police officer must explain to the young person (in a manner and language appropriate to the understanding of the young person)[106]:

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[105] Above n98, 27.

[106] Section 218.

(a) that the young person may be arrested if he or she refuses to give his or her name and address;

(b) that the young person is not obliged to accompany the police officer to any place to be questioned, and if he or she consents to do so, that consent may be withdrawn at any time;

(c) that he or she is under no obligation to make any statement;

(d) that if he or she does consent to make a statement, that consent may be withdrawn at any time;

(e) that any statement made may be used in evidence; and

(f) that he or she is entitled to consult with, and to make any statement in the presence of, a solicitor[107] **and** any adult the young person nominates (eg a parent or another member of the family or whanau, or any other adult)[108].

Where a young person is arrested, only the last 4 explanations must be given.

The Act provides that (unless the explanations have been given within the last hour)[109], the explanations outlined above must again be given when a police officer makes up his or her mind to charge the young person and the last 4 explanations outlined above must again be given when arresting a young person.[110]

When section 215 is analysed closely, it is apparent that the only rights a young person has which exceed an adult's rights when being questioned are:

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[107] See also sections 227 and 228 - entitlement to consult privately with a solicitor when being questioned at an enforcement agency; when arrested; and when being questioned in hospital.

[108] See section 222. Note, however, the enforcement officer may refuse permission to consult with any nominated person in certain circumstances.

[109] Section 219.

[110] Sections 217 and 218 respectively.

(1) the right to be *informed* of his or her rights when questioning in relation to the possible commission of an offence by that young person *commences* (an adult must be informed of his or her rights only once it has been decided to charge him or her, or on arrest)[111]; and

(2) the right to have an independent adult present during questioning, in addition to a solicitor.

With the exception of the right to have an independent adult and a lawyer present during questioning,[112] the rights a young person must be informed of pursuant to section 215 are basic rights that every person in New Zealand has who is under investigation. All the other rights exist independently of the CYPF Act, and apply equally to adults. They may be summarised as:

(a) the right to liberty and not to be arbitrarily detained, which is provided in Articles 3 and 9 of the Universal Declaration of Human Rights and Article 9(1) of the ICCPR, and recognised in section 22 of the Bill of Rights;

(b) the right to remain silent, which is provided in Article 3(g) of the ICCPR and recognised in the Judges Rules 1912 and in sections 23(4) and 25(d) of the Bill of Rights; and

(c) the right to consult a lawyer, which is provided in Article 14(3)(b) of the ICCPR and recognised in section 24(c) of the Bill of Rights.

The New Zealand Police Association made submissions to the committee reviewing the CYPF Act criticising section 215 and arguing that the section should be repealed.[113] They submitted that the provision for informing a young person of his or her rights once it has been decided to lay a charge is sufficient. They argued

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[111] See Judges Rules 1912, No 2; Bill of Rights Act 1990, ss 23 and 24.

[112] See pages 47-51 below for discussion of this right.

[113] New Zealand Police Association (Inc), Submission on the Review of the Children, Young Persons and their Families Act 1989, October 1991, p 8.

that section 215 reduces police effectiveness when they are investigating offences, meaning they are unable to gather even general information about offences involving children or young persons.

However, section 215 does not prohibit general inquiries being made of young persons in relation to an offence, unless the inquiries relate to the possible commission of an offence ***by that young person***. Where this is the case, it is submitted there is good reason to inform the young person of his or her rights at the commencement of questioning. Doing so will ensure that the young person is not denied the protection available to all persons during investigations purely by reason of his or her immaturity. It is reasonable to assume that a young person is less likely to be aware of his or her rights than an adult, and that even where a young person is aware of his or her rights, he or she may lack sufficient confidence to exercise those rights. What section 215 does, then, is to ensure that young persons are made aware that they have rights, and that they are entitled to exercise them when they are under investigation.

A system allowing interviews to proceed without a young person being informed of his or her rights until the investigating officer has decided to charge the young person is open to abuse. This is well illustrated by the cross examination of an officer which is set out in ***R v Butcher***,[114] in which the officer admits deliberately delaying formally charging a suspect in order to obtain a confession from him before he was obliged to inform him of his right to a lawyer under the Bill of Rights.

Another criticism that has been levelled at section 215 is that it leaves police powerless to deal with a hard core of "streetwise" young offenders, who are well aware of their rights.[115] Under the Act the police have the power to arrest a young person if they believe it is necessary in the public interest or that proceeding by way of summons will not ensure a Court appearance; and they may also question or warn young persons, providing they inform them of their rights first. If these

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[114] [1992] 2 NZLR 257.

[115] See ***The Evening Post***, Wellington, New Zealand, 25 January 1992, 1 - "Hard Core of Lawless Youth Stymies Police" and ***The Dominion***, Wellington, New Zealand, 18 February 1992, 7 - "Act Makes it Tough for Police to Nab Young Thugs".

young people are already aware of their rights, it is hard to see why informing them is a problem.[116]

Repealing section 215 will not make it any easier for the police to deal with the hard core, streetwise young offenders, who are already aware of their rights. The only young persons who will be affected are those who are unaware of their rights, or lack confidence to exercise them, and these are the ones who most need the protection afforded by section 215 to enable them to exercise the basic rights which any person in New Zealand has when under investigation.

The right of young persons to extra protection because of their vulnerability is well grounded in international human rights instruments. I have highlighted these provisions in Part I of this paper, but they bear repeating. In particular, the Universal Declaration of Human Rights provides that childhood is entitled to "special care and assistance";[117] the ICESCR provides that "special measures of protection and assistance should be taken on behalf of all children and young persons";[118] and the ICCPR provides that "[e]very child shall have ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."[119] In the context of investigating an alleged offence by a juvenile, Rule 10.3 of the Beijing Rules provides:

> Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case.

The official commentary to Rule 10.3 states:

> Rule 10.3 deals with some fundamental aspects of the procedures and behaviour on the part of the police and other law enforcement officials in cases of juvenile crime. To "avoid harm" admittedly is flexible wording and covers many features of possible interaction (for example the

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[116] See comments in "*Children*", the magazine of the Office of the Commissioner for Children, March 1992, No 4, p 4.

[117] Above n11, Article 25(2).

[118] Above n12, Article 10(3).

[119] Above n12, Article 24.

> use of harsh language, physical violence or exposure to the environment). Involvement in juvenile justice processes in itself can be "harmful" to juveniles: the term "avoid harm" should be broadly interpreted, therefore, as doing the least harm possible to the juvenile in the first instance, as well as any additional or undue harm. This is especially important in the initial contact with law enforcement agencies, which might profoundly influence the juvenile's attitude towards the State and society. ...

The obligation on police officers to avoid harm to the juvenile on initial contact would clearly encompass informing a young person suspected of having committed an offence of his or her rights at the commencement of the investigation. Repeal of section 215 would deny young persons the special protection to which they are entitled under international human rights instruments.

The Ministerial Review Team on the CYPF Act who, amongst other things, were charged with the task of considering and making recommendations on proposals for amendment to the Act by police, supported the retention of section 215. In their report[120] ("the Mason Report") the team propose dealing with the police criticism that they feel hampered from making even general inquiries of young people be dealt with by an amendment to the section to allow "general inquiries" to take place before a young person must be informed of his or her rights. A working party is to be set up to define exactly what is meant by "general inquiries". This would, in any event, appear to have been the original intention of the drafters of the Act.[121] Provided the definition of "general inquiries" is carefully drafted, there can be no objection to this amendment. The definition must be worded to ensure that once the investigation into an offence has proceeded to the point where a *particular* young person is suspected, section 215 will operate to place an obligation on an investigating officer to inform that young person of his or her rights while evidence is still being collected, and prior to a decision being made to charge him or her. This is the most critical time when a young person can exercise his or her basic rights.

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[120] Report of the Ministerial Review Team to the Minister of Social Welfare ***Review of the Children, Young Persons and Their Families Act 1989*** (Wellington, 1992), 158.

[121] Above n120, 153.

Recent investigations into the functioning of the CYPF Act in practice have revealed that the procedures laid down in section 215 are frequently not being followed by police when questioning young persons in situations where a formal statement is not being sought. The study revealed that some police may make a distinction between questioning young persons, and taking formal statements from them, and will only inform young persons of their rights prior to taking a statement which they wish to use in court.[122] This is clearly not the intention of section 215, which requires a young person's rights to be explained to him or her prior to any questioning.

Furthermore, it is submitted that the practice of only informing a young person of his or her rights prior to taking a formal statement does not accord with international instruments which set out the special protection that must be provided to young persons.

5. Adult Support

A number of provisions in the CYPF Act enable a child or young person who is to be interviewed to receive the support of an adult. These sections give practical effect to the principle that the vulnerability of young persons entitles them to special protection.

Right to have a parent or guardian informed of arrest and to consult an independent adult and/or a solicitor

Section 229 provides that where a young person is at an enforcement agency office for questioning or following arrest, the police officer must, as soon as practicable after the young person arrives at the police station, inform a person nominated by the young person[123], **and** (unless it is "impracticable" to do so) a parent or guardian of the young person (if the young person has not already nominated such

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[122] Above n182, 72. [NB: As at 1 September 1992 publication of this paper is pending, and the citing of it has only been permitted on the basis that any findings will not appear in any publication without the prior consent of the authors.]

[123] The person must be nominated in accordance with section 231, and may be any adult the young person chooses, but the enforcement officer has a right of refusal where he or she believes, on reasonable grounds, that the person nominated would be likely to attempt to prevent the course of justice if allowed to visit the young person.

person). Those people are entitled to visit and consult privately with,[124] the young person at the police station, and must be informed, as soon as practicable after arriving at the police station of the young person's rights.

In addition, under section 227, a young person in these situations must be informed that he or she is entitled to consult a lawyer.

The obligation on police to inform parents of the arrest or detention of their child is well-grounded in international instruments. The provision in section 229 that parents may not be informed of their child's detention if it is "impractical" to so inform them, however, does not accord with international requirements. To accord with the international instruments, the parents of a young person who has been arrested or detained must be informed immediately.

The Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment provide for detained persons and their counsel to be informed of the charges against them,[125] and Principle 16 provides:

> (1) **Promptly** after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody. ...
>
> (3) If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.[126] [my emphasis]

Rule 92 of the Standard Minimum Rules for the Treatment of Prisoners provides that:

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[124] Note, however, section 229(3).

[125] Above n21, Principles 10, 11 and 17.

[126] See also Article 40 of the Convention on the Rights of the Child, and Article 7.1 of the Beijing Rules.

> An untried prisoner shall be allowed to inform **immediately** his family of his detention and shall be given all reasonable facilities for communication with his family and friends, and for receiving visits from them ... [my emphasis]

Rule 10.1 of the Beijing Rules provides:

> Upon the apprehension of a juvenile, her or his parents or guardian shall be **immediately** notified of such apprehension and, where such immediate notification is not possible, the parents or guardian shall be notified **within the shortest possible time** thereafter. [my emphasis]

Right to have an independent adult present during interviews

While the CYPF Act falls short of prohibiting police interviews with young persons without an adult being present, it does provide that only statements made in the presence of either a solicitor or an independent adult will be admissible evidence in court. The common law recognises the general principle that if evidence is to be fairly obtained at an interview with a young person an adult should be present, as recommended in the police General Instructions.[127]

Nevertheless, prior to the CYPF Act evidence was admissible at the Court's discretion where a young person was interviewed alone (the issue being whether the statement was obtained "fairly"), and it has been suggested that the recommendation in the Police General Instructions was "routinely ignored".[128]

The original draft of the Children and Young Persons Bill provided that a statement made without an adult being present would be admissible evidence in proceedings, if the young person being interviewed had waived this right. There were a large number of submissions made to the working party on the Bill that this was an insufficient safeguard, and that the provision should be clear that statements will be

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[127] See Part II above.

[128] R Ludbrook, Youth Law Project, submission to the Working Party on the Children and Young Persons Bill, submission number SS/89/270, p 3.

inadmissible if not made in the presence of an independent adult.[129] The 1987 Working Party Report[130] summarised these submissions, saying:

> [Children's rights groups] believe that the provisions on admissibility of statements fail to give due recognition to the vulnerability of young people to the pressure inherent in arrest. There is concern that they may, as a result, inappropriately waive their basic rights. They believe there should be a provision that the Court shall not admit as evidence any statement made by a child or young person unless it has been made in the presence of a parent, guardian, person for the time being having responsibility for the welfare of the child or young person, or other trusted adult nominated by the child or young person.
>
> This position is supported by an article in the New Zealand Law Journal, 19 August 1980, by the Public Issues Committee of the Auckland District Law Society, reviewing the case of two 15 year old youths who were induced by Police questioning to make false admissions of guilt to a murder and who were subsequently charged.

The Working Party concluded that despite police views to the contrary, the clause should be strengthened to remove the provision for a young person to waive the right to an adult's presence during interviews. They stated that the earlier draft which provided for the possibility of a waiver, ignored "the vulnerability of the child or young person to persuasion."[131] Accordingly, section 221 now provides that a young person's statement will not be admissible in Court unless it was made in the presence of an independent adult.

In submissions to the Ministerial Review Team on the CYPF Act,[132] the Police Association sought amendment to section 221 to allow evidence of an interview to be admitted if it was taken by means of videotaping, where a suitable adult could not be contacted within a reasonable time (they suggested 2 hours). They cited

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[129] See, for instance, the submissions of: the Human Rights Commission, SS/89/157 pp 11-13; the Methodist Connexional Youth Task Group SS/89/159, p 3; the Youth Law Project, SS/89/270, pp 3-4; the Common Law Committee of the Auckland District Law Society, SS/89/84, p 3; the Labour Youth Council, New Zealand Labour Party, SS/89/72, p 8; W Young (Director Institute of Criminology, Victoria University of Wellington) and N Cameron (Senior Lecturer in Law, Victoria University of Wellington), SS/89/108, pp 43-44; the New Zealand Council for Civil Liberties, SS/89/20, p 2; and the National Youth Council of New Zealand, SS/89/126, p 2.

[130] Working Party on the Children and Young Persons Bill, ***Review of the Children and Young Persons Bill*** (Wellington, 1987,) 60.

[131] Above n130, 62.

[132] Above, n113.

examples where considerable time was spent locating suitable adults so that an interview could proceed. The Ministerial Review Team have indicated support for this request in principle.[133] The Mason Report recommends that consultations take place between the Department of Social Welfare, the police, the Justice Department and the New Zealand Law Society to consider the feasibility of this suggestion.

While videotaping an interview would provide protection for a young person from blatantly unfair questioning, it hardly provides guidance and support for the young person in exercising his or her rights, such as the right to remain silent. It is submitted that a videotape is no substitute for the physical presence of an independent adult - preferably one selected by the young person.

In ***R v W***[134] Robertson J spoke of the function of an independent adult being present at an interview with a young person pursuant to the requirements of the police General Instructions, in the following terms:

> I do not accept that the individual person was there to simply monitor procedure. She was there so that [the young person] would not be disadvantaged. Although she was clearly an experience and caring person there were still disadvantages. First, she was not known to [the young person] and there was little established rapport between them. Secondly, she did not comprehend that she had a pro-active role in ensuring that [the young person] was able to enjoy whatever advantages the general law provided for him.

After referring to the campaign to have police interviews videotaped, and stating that in the case before him there was no dispute as to the accuracy of the police officers recollection of what was said, Robertson J continued:

> The question here is the circumstances in which it was said and the procedures which ought to have attended the obtaining of the evidence. These are fundamental issues not addressed by the sophistication of recording techniques.

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[133] Above n120, 186.

[134] Above n49, 3.

In ***R v Tuhua***[135] the Court of Appeal concluded, in relation to a statement made to the police by a young person without the presence of a supportive adult, that "[t]he dynamics of the interview would have been quote different had a second adult been present. Here the police were in a position of dominance and the oral evidence was obtained by their use of that dominant position."

The right to have a supportive adult present during questioning is supported at international law. In particular, Rule 7.1 of the Beijing Rules provides:

> Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, ***the right to the presence of a parent or guardian***, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings. [My emphasis][136]

Section 222 already enables police to interview young persons where a particular adult selected by the young person is inappropriate or unable to be located within a reasonable time, without the need to resort to videotaping the interview. Section 222 allows the Police to refuse to allow consultation with an adult nominated by a young person if it is believed, on reasonable grounds, that that person nominated:

(a) would be likely to attempt to pervert the course of justice; or

(b) cannot with reasonable diligence be located, or will not be available within a period of time that is reasonable in the circumstances.

If there is a refusal on these grounds, the young person may nominate another adult. Where the young person refuses to nominate a suitable adult, the police may themselves nominate ***any adult*** who is not an enforcement officer.[137] Thus, if a

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[135] Above n47.

[136] Note also, Article 3(2) and Article 5 of the Convention on the Rights of the Child; and Rule 10.1 of the Beijing Rules; and principles 16, 17, 18 and 19 of the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment.

[137] Section 222(1)(d).

suitable adult will not be available within a "reasonable" time, the Police may themselves nominate an adult to be present at the interview. It must be possible to organise a roster of adults willing to be contacted for this purpose from amongst, say, Citizens Advice Bureaux staff, Youth Advocates, Community Law Centre personnel, Social Welfare personnel, etc. It is relevant that a recent study of the functioning of the CYPF Act has found that in 81% of cases the parents of young persons detained by police were able to be contacted either straight away or within an hour.[138]

The right to have an independent adult present during interviews is an important, basic right for a young person, supported by international guidelines as to the treatment of young persons. This right should not be allowed to be eroded by the substitute of a requirement to videotape interviews where a suitable adult cannot be located. The current provisions allow the police to nominate an adult if it is not possible to locate an adult nominated by the young person who is able to be present within a reasonable time. This provision is sufficient to allow interviews to proceed without denying the young person the support of an independent adult.

6. Exclusion of evidence

Section 221 provides that no statement made to an enforcement officer by a young person is admissible in evidence in proceedings against the young person unless:

(1) prior to making the statement the young person's rights were explained; and

(2) where the young person expressed a wish to consult with a solicitor and/or another adult nominated by the young person, he or she did so before making the statement; and

(3) the statement was made in the presence of a barrister or solicitor, and/or an independent adult.

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[138] Above n82, 72-73.

However, statements will not be inadmissible where any requirement of section 221 was not complied with, provided there was "reasonable compliance";[139] or where the statement was made spontaneously before the enforcement officer had a "reasonable opportunity" to comply with the requirements of that section.[140]

This section *prima facie* gives a young person a more certain remedy than an adult would have if his or her rights were breached. An adult derives rights from the Judges' Rules and the Bill of Rights. A breach of the Judges' Rules will mean the court has a *discretion* whether to admit evidence obtained by that breach. However, it has been held that a breach of the standard of conduct provided in the Judges' Rules will go a long way towards excluding any evidence obtained.[141] In relation to a breach of rights under the Bill of Rights, Cooke P in the Court of Appeal in 1991 stated the principle that "prima facie, ... a violation of the Bill of Rights should result in the ruling out of evidence obtained thereby."[142] Accordingly, in practice the rules relating to admissibility of evidence obtained in breach of an adult's rights and a youth's rights may not be very different.

The Courts so far have generally not shrunk from giving full force to the exclusion of evidence provision,[143] which has, at times provoked a public outcry. Most notably in the case of Jason Irwin, where a 15 year old was discharged from a murder charge for lack of evidence, following his statement being ruled inadmissible under section 221. Fisher J stated:

> In the absence of reasonable compliance [with section 221] the Court has no discretion: it must reject the statement.[144]

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[139] Section 224.

[140] Section 223.

[141] ***R v Convery*** [1986] NZLR 426, 442, per McCarthy J.

[142] Above n114.

[143] See ***R v Toko*** (1991) 7 FRNZ 447; ***R v Irwin*** (1991) 8 CRNZ 39, (1991) 8 FRNZ 487; ***R v Fitzgerald*** Unreported, 30 October 1990, High Court Auckland Registry T183/90, Thorp J.

[144] ***R v Irwin***, above n143.

He concluded that in the case before him there were numerous breaches of the Act which were "individually significant and cumulatively overwhelming."

A case that has allowed evidence to be presented despite breaches of section 221 is the Court of Appeal decision in ***R v Accused***.[145] In that case a 14 year old boy was interviewed in his mother's presence, but was not told he could nominate any adult to consult with and make his statement in the presence of. In addition, although he was informed that he had the right to consult a lawyer, he was not further told that he could have the lawyer present while he was interviewed. Despite these breaches, Robertson J in the High Court concluded there was "reasonable compliance" with section 221 on the basis that the boy did not ask to consult a lawyer when informed of his right to, and therefore would not have requested a lawyer's presence during the interview had he known of this right; and on the further basis that his mother was present throughout the interview and this sufficiently met the requirement for an adult's presence, even though the adult was not there pursuant to nomination by the young person. Robertson J stressed that his decision was predicated on the basis that there was no **intentional** deviation from the provisions and no endeavour to take advantage of the boy. He said:

> I am prepared to apply s 224 to a situation where I am able to say with confidence that what Parliament determined young folk must have so that they are not taken advantage of, was in fact and in realilty [sic] provided to this lad.[146]

The Court of Appeal upheld the decision that this was a case of reasonable compliance, but noted that this case was "not far from the borderline."[147] Cooke P, delivering the judgment of the Court, stated:

> We are far from suggesting that these sections impose mere formalities and may be disregarded with impunity by investigating police officers. That is certainly not the case. Had we entertained any concern about adequate protection for this particular young person, the Court would not have hesitated to reverse the learned Judge's decision.

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[145] (1991) 8 FRNZ 119.

[146] ***R v F*** Unreported, 12 September 1991, High Court DUnedin Registry T9/91, Robertson J, 12.

[147] Above n145, 122.

The rules relating to exclusion of evidence are designed to ensure compliance with provisions in the CYPF Act which protect young persons. The principle of "effective protection of rights" requires interpretation of legislation designed to protect human rights in a way that secures effective enjoyment of those rights in any given situation.[148] The Courts must continue to be vigilant in excluding evidence obtained from young persons where section 221 has not been fully complied with. Wherever there is any suggestion that the failure to comply with section 221 has resulted in a denial of a young person's internationally recognised right to special protection, any evidence so obtained must be excluded.

It will be seen from this paper that the rights of young persons which must be complied with before evidence will be admissible are fully defensible at international law, and are largely identical to an adults" rights. The differences that do exist (the right of a young person to be *informed* of his or her rights when investigation commences; the right to have an adult *and* a solicitor present at a interview; and the mandatory exclusion of evidence unfairly obtained), give force to the principle that a young person's vulnerability entitles him or her to extra protection.

V CONCLUSION

International human rights instruments stress the right of children and young persons to special protection. In the past, laws and practices in New Zealand have fallen short of the standards now required by international instruments. This can be explained by the fact that the major international instruments that specifically detail the protection young persons are entitled to in the criminal process have been drafted since 1985. However, it is imperative that our current laws and practices meet the standards set down in the international instruments.

The CYPF Act has introduced a change in philosophy from the "welfare" model to the "justice" model of dealing with young offenders, which is a move to promote

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[148] A Shaw and A Butler, ***The New Zealand Bill of Rights comes alive (I)*** [1991] NZLJ 400, 402.

accountability for offending. Along with this change, certain rights of young people under investigation have been given legislative force - largely these are rights which young persons have quite apart from the CYPF Act and are shared equally by adults.

In this paper I have shown that the philosophy, object, principles and provisions of the CYPF Act, in the areas I have examined, represent a marked improvement on previous laws and practices. However, I have highlighted certain areas where New Zealand laws and practices could improve. In particular, the age at which young persons benefit from the special protection of the CYPF Act is lower than that suggested in the international instruments; and the right of young persons to participate in decisions which affect them is not being effectively guaranteed to them. I have also highlighted the fact that amendments to the CYPF Act are currently being considered which could erode rights provided under the CYPF Act. It is essential that any amendment to section 215 to allow "general inquiries" to be made of young persons without informing them of their rights is worded in a way that ensures any individual young person who is under investigation receives the protection of section 215. Further, no amendment should be made to the provision that young persons' statements are inadmissible unless they were made in the presence of an adult independent from the police. Videotaping interviews is no substitute for the presence of a supportive adult, and does not provide "special protection" to young persons as required in the international instruments.

It is important not to lose sight of the fact that young persons are vulnerable. They should not be judged against the standards we expect adults to meet. The Riyadh Guidelines stress that:

> ... youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood.[149]

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[149] Above n31, Guideline 5(e).

Moira Rayner, the Commissioner for Equal Opportunities in Victoria, Australia, says:[150]

> We are tolerant of small children's need to learn by their mistakes, and indulge "bad manners" in toddlers, but not in teenagers. We tolerate the anarchy and social failings of young children because we know they will, after all, grow out of it. We are not so accepting of the failings of older children who we treat as offenders against the criminal law but who also, statistically, "grow out of it". (emphasis in original)

Viewed against international instruments in the youth justice area the CYPF Act is not perfect; however, it does represent a significant advance towards meeting international standards, and is therefore undeserving of the criticism that continues to be levelled at it.

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[150] M Rayner "Taking Seriously the Child's Right to be Heard" in P Alston and G Brennan (eds) ***The UN Children's Convention and Australia*** (ANU Centre for International and Public Law, Canberra, 1991) 6, 7.

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